

***United States Court of Appeals
for the Second Circuit***



**APPELLEE'S
APPENDIX**

74-1366

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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JOHN CHARLES FERRANTO,

Appellant.

- against -

UNITED STATES OF AMERICA,

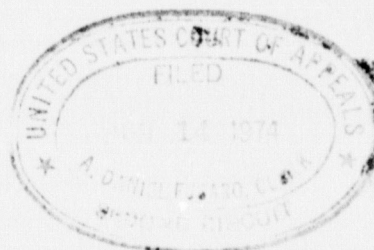
Appellee.

----- X

APPENDIX FOR APPELLEE

DAVID G. TRAGER
United States Attorney,
Eastern District of New York.

RAYMOND J. DEARIE
STEVEN KIMELMAN
Assistant U.S. Attorneys,
Of Counsel



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11:16
11/15/71

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
BROOKLYN, NEW YORK

JOHN CHARLES FERRANTE, PETITIONER

-VS-

UNITED STATES OF AMERICA, RESPONDENT

CIVIL _____

NOTICE FOR MODIFICATION OF SENTENCE

ONLY COPY AVAILABLE

Submitted by:
John Charles Ferrante, Petitioner
United States Penitentiary
P.M.B. - 74054-153
Atlanta, Georgia 30315

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
BROOKLYN, NEW YORK

JOHN CHARLES FERRANTO,
Petitioner

vs.

CIVIL ACTION _____

UNITED STATES OF AMERICA,
Respondent

MOTION TO PROCEED IN FORMA PAUPERIS

Comes now petitioner, JOHN CHARLES FERRANTO, in propria persona, and respectfully moves this Honorable Court, pursuant to the provisions of Title 28, United States Code, Section 1915, for permission to proceed in forma pauperis, in filing the attached MOTION FOR A MODIFICATION OF SENTENCE.

Petitioner states that he is an indigent person under the provisions of the above entitled section as well as the Attorney General's Report on Poverty, Callan Report, 1963, supra. An affidavit of poverty is attached hereto.

Respectfully submitted,

John Charles Ferranto, Petitioner Pro Se.

STATE OF GEORGIA)
: SS
COUNTY OF FULTON)

AFFIDAVIT OF POVERTY

BEFORE me, the undersigned authority, JOHN CHARLES FERRANTO,
who, after being duly sworn according to law, underoath, deposes and says:

That he is a citizen of the United States; of legal
age; and

That because of his poverty he is unable to pay the
costs of the instant cause of action, or to give any
security therefore; and

That he is a pauper within the meaning of the law
(Addins -vs- DuPont, 335 U.S. 331); and

That he seeks redress, in good faith, to obtain the
relief to which he verily believes he is entitled
to receive.

WHEREFORE, it is respectfully requested that this Court grant
leave to proceed herein in forma pauperis, for otherwise an injustice
shall occur, and affiant will be foreclosed relief by reason of his in-
ability to pay the costs thereof.

SWORN TO AND SUBSCRIBED BEFORE

ME THIS 25 DAY OF JULY, 1973.

James K. Fleagle
PAROLE OFFICER

John Charles Ferranto
JOHN CHARLES FERRANTO, AFFIANT
Filed Clerk: Accepted by the Clerk of
the Court, U.S. District Court (S.D. U.S.C.)
JUL 27 1973

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
BROOKLYN, NEW YORK

JOHN CHARLES FERRANTO,

Petitioner

vs.

CIVIL ACTION _____

UNITED STATES OF AMERICA,

Respondent

MOTION FOR MODIFICATION OF SENTENCE

Comes now petitioner, JOHN CHARLES FERRANTO, in propria persona, and respectfully moves this Honorable Court, pursuant to the provisions of Title 28, United States Code, Section 2255, to correct and/or modify the sentence imposed on petitioner on March 3, 1972, in criminal docket number 71-1138.

STATEMENT OF THE CASE

Petitioner is presently incarcerated at the United States Penitentiary, Atlanta, Georgia, having been committed to this institution on March 14, 1972. After a plea of guilty to a violation of the Bank Robbery Statute, this petitioner received a sentence of fifteen (15) years, subject to the sentencing provisions of 4208 (a).

POINTS AND AUTHORITIES

Prior to the imposition of the sentence, the Court had available to it certain information from F.B.I. File No. 79 321 B, along with information accumulated in a presentence investigation report on this petitioner, and from this information, the Court made it's imposition of sentence. This petitioner has since been able to secure a copy of the presentence investigation given to the Court, as well as a record of the F.B.I. file and will show this Court that the charges contained therein are erroneous, and the information, when modified demands the Court to reconsider the sentence imposed upon this petitioner.

PETITIONER SUBMITS THE FOLLOWING:

APRIL 23, 1950- Investigation, Suspicion of Death, Alexandria, Virginia, no disposition on record.

This charge stemmed from the death of petitioner's son and the records will disclose that this petitioner was completely exonerated as to any connection with the incident, however, the charge still remains on the record of this petitioner.

MAY 7, 1952- Grand Larceny, Suffolk County Court, one year in Suffolk County Jail, probation and restitution.

There was no Grand Larceny involved in this incident as the records will disclose this petitioner sold an automobile belonging to him, and paid off the balance owing on the automobile. The charge under which this petitioner served the year in jail was petit larceny.

FEBRUARY 22, 1951- Larceny of Bank, Disorderly Conduct, Assault and Battery, Arlington, Virginia.

This petitioner has the records in this particular charge, and the warrant charges disorderly conduct, and nothing else contained therein.

This petitioner would show this Court that the entire file as used by this Court in the presentence investigation to impose the sentence on him must be revised, up to and including his adjustment in this institution, and from the re-evaluated report, this Court has the obligation of reconsidering the sentence imposed.

The higher Courts have held in numerous cases that the use of invalid convictions to impeach, or determine the imposition of sentence on a defendant must be corrected by the sentencing judge ordering a proper presentence investigation, eliminating those convictions or charges that are untrue, or unconstitutionally unsound, and adjust or modify the sentence according to the revised report.

In the case of Burgett vs. Texas, 389 U.S. 109, the Court held:

"To permit a conviction obtained in violation of Gideon vs. Wainwright, 372 U.S. 335 to be used against a person to support guilt or enhance punishment for another offense.... is to erode the principal of that case... Worse yet, since the defect in the prior conviction was denial of right to counsel, the accused in effect suffers anew the deprivation of.....that right." 389 U.S., at 115.

In Eato vs. Stacks, 403 F. 2d 314 (5th Circuit 1969), the court broadened the scope of Burgett, Supra, to prohibit use of any invalid or constitutionally void conviction to enhance punishment or to impeach credibility.

In United States vs. Lufman, 457, F. 2d 165, 167 (7th Cir. 1972):

The court held that it was a denial of fundamental fairness and due process to allow the use of invalid prior convictions to be used as proof of guilt, to impeach credibility or to enhance punishment...and shifted the burden upon the prosecution to prove the validity of such convictions.

C. HOLDEN

WHEREFORE, This petitioner PRAYS that this Court so ORDER that a new pre-sentence investigation report be presented to this Court, and that a copy of the revised report be submitted to this petitioner, and upon receiving a true and accurate account of the prior record of this petitioner to correct and modify the sentence imposed on him in this case as per the provisions of Holzer -vs- United States, 404 U.S. 143 (1972); and as to the provisions of Adams, this Court must remedy the damage caused by an improper pre-sentence report.

Respectfully presented,

STATE OF GEORGIA)

: ss

COUNTY OF FULTON)

John Charles Ferranto,
Petitioner Pro Se

SWORN TO AND SUBSCRIBED BEFORE ME THIS 25 DAY OF JULY, 1973.

James K. Flegal PUBLIC OFFICER.

Public Officer: Authorized by the Act of
July 7, 1965 to Administer Oaths (18 U.S.C.
4051).

CERTIFICATE OF SERVICE BY MAIL

I, the undersigned hereby state that I am the petitioner in the attached Motion, and that I have mailed a copy of said motion to Hon. Edward R. Weeber, United States Attorney, Eastern District of New York, Brooklyn, New York, by placing said copy in the United States Mails, at the United States Penitentiary, Atlanta, Georgia.

John Charles Ferranto
JOHN CHARLES FERRANTO, PETITIONER

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

JOHN CHARLES FERRANTO,

Petitioner,

73 C 1193
(71 CR 1133)

-against-

Memorandum of Decision
and Order

UNITED STATES OF AMERICA,

Respondent.

August 9, 1973

Petitioner moves pursuant to 23 U.S.C. § 2255 to vacate the sentence imposed on March 3, 1972, committing him to the custody of the Attorney General of the United States for a term of fifteen (15) years pursuant to 18 U.S.C. § 4203(a)(2). The sentence was imposed on a plea of guilty to a charge of armed bank robbery, 18 U.S.C. § 2113(a). The ground asserted is alleged errors or misstatements in the presentence report.

The probation report recites the following under the caption "prior record:"

pending against him in our Court. In essence, the defendant's statement impressed us as being unconvincing and there appears to be much more to the circumstances surrounding his involvement than he is willing to divulge.

2. . PRIOR RECORD:

AS a youngster, the defendant had numerous run-ins with the law for escapades ranging from running away from home to stealing automobiles. As a result of his incorrigibility he was placed in Children's Village, by the Kings County Children's Court, in September, 1945. He remained in placement at this institution until January, 1947, when he was discharged to his family's custody.

4/23/50- (age 20)	Investigation (Suspicion of Death)	-	Alexandria, Va.-	No disposition on record.
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The defendant advises that in this instance he was arrested by the Alexandria Police following the sudden, accidental death of his step-son. He indicated that since the police were unable to prove that there was any wrongdoing he was released by authorities.

5/7/52 - (age 22)	Grand Larceny	-	Suffolk County - Court	1 year, Suffolk County Jail ESS- Probation Sp.Con. Restitution
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2/22/54 (age 23)	Larceny of Bank 2- Disorderly Conduct 3- Assault & Battery	-	Alexandria, Va. -	2/24/54- 1-Dismissed 2-30 days 3-Dismissed
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1/24/56- (age 25)	Grand Larceny	-	Arlington, Va. -	2/7/56-dismissed.
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7/17/57 (age 27)	Armed Robbery	-	Arlington, Va. -	12/10/57- 12 years paroled 1/13/63 max. exp. of sent. 9/7/65
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In this instance, the defendant robbed a shoe store and successfully made off with \$336 in currency. The defendant was however, arrested by police shortly after commission of the crime. Subsequently, while awaiting sentence, the defendant and two others escaped from the Alexandria City Jail and then broke into a gas station in order to steal an

automobile which they used for their getaway car from the Alexandria City Jail. The defendant and his cohorts were subsequently apprehended in Roanoke, Virginia, and returned to Alexandria, Virginia.

6/26/67 - Breaking & Entering -
(age 27)

Fairfax Cty. Court, - 1/31/68-18
Virginia mos. concurrent
to above sent.

This offense relates to the defendant breaking into a gas station with two others after escaping from the Alexandria City Jail.

6/6/66 - Fraudulent check -
(age 30)

1st District Court - 6/26/66 - Com-
Suffolk County plaint with-
drawn

6/26/66 - Disorderly Conduct, -
(age 36) Assault, III,

1st District Court - No disposition
Suffolk County on record

2/23/70 - Attempted Murder, Rob-
(age 40) bery I, Kidnapping,
Grand Larceny, Posses.
of a Weapon

Nassau County Court - Pending

In this instance, on December 16, 1970, in Jericho, Long Island, the defendant and one Nicholas Tullo, kidnapped the manager of a Waldbaum Supermarket and his associate while they were enroute to the bank with the days receipts. They proceeded to drive them in the defendant's car to a deserted area in Suffolk County, and told them to walk into the woods, whereupon Tullo shot them both, inflicting injuries that necessitated later hospitalization. They then made off with the \$5,500 in receipts and were subsequently arrested after an extensive investigation.

2/28/71 - Possession of a -
(age 41) Deadly Weapon
Criminal Mischief

Nassau County Court - Pending

4/5/71 - Arrested by F.B.I. Agents for instant offense

Subsequently, two other indictments were filed against the defendant in this District charging him with robbing Bankers Trust Company, and Reliance Federal Savings and Loan Association, in which \$24,916 and \$29,719 were stolen respectively. In these instances, the defendant vaulted the teller's counter and secured the money, while his confederate Grillo held the employees and customers at bay while armed with a sawed-off shotgun.

Petitioner makes the following claims:

"April 28, 1959-Investigation, Suspicion of Death, Alexandria, Virginia, no disposition on record.

This charge stemmed [sic] from the death of petitioner's son and the records will disclosed [sic] that this petitioner was completely exonerated as to any connection with the incident, however, the charge still remains on the record of this petitioner."

The court inquired as to the disposition of the charges of Attempted Murder, Robbery I, Kidnapping, Grand Larceny and Possession of a Weapon, pending in the Nassau County Court at the time of sentence. The court learned that on August 14, 1972, the petitioner pleaded guilty to Robbery I, and was sentenced to a term of fifteen years.

Assuming the petitioner's version of the portion of the prior record to be true, the petition is insufficient as a matter of law. The court did not rely to slightest degree on the charges referred to in the petition. The Armed Robbery charge for which the petitioner was sentenced to a term of twelve years on December 10, 1957; his escape from the Alexandria City Jail; and the subsequent Breaching and Entering conviction on January 31, 1958, were factors in determining the length of sentence

imposed. Petitioner's co-defendant (Grillo) used a sawed-off shotgun in the armed bank robbery, the offense made the subject of this petition. The court is convinced that petitioner is a man of violence, inclined to use and/or tolerate the use of deadly weapons in the commission of crimes. The plea of guilty to the Nassau County charges lends further support to this finding.

The petition is dismissed and it is

SO ORDERED.

The Clerk of the Court is directed to enter judgment in favor of the respondent and against the petitioner.

The Clerk is directed to mail a copy of this memorandum of decision and order to petitioner.

Joseph M. Schler

U. S. D. J.

Details. The report of the F.B.I. reflects that their investigation commenced on October 6, 1971, when they received information that two white males had just successfully executed an armed robbery at the National Bank of North America, 192-02 Northern Boulevard, Queens, New York, in which \$11,863 was taken. Subsequent investigation disclosed that at approximately 9:30 A.M. on the above date, the two perpetrators later identified as the defendant and John Grillo entered the bank and announced the holdup. Grillo, while armed with a sawed-off shotgun, proceeded to herd the four female employees into a rest room and hold them at bay. In the interim, defendant Ferranto vaulted the teller's counter and removed \$11,863 from the teller's drawers. Once they had obtained the money, the two perpetrators then successfully made their escape. After agents obtained a composite description of the two bandits, they proceeded to launch an extensive investigation in an attempt to determine their identities.

During the following month, agents, as a result of information supplied by an informant, located Grillo on November 3, 1971, and arrested him for the instant offense. When questioned by authorities, Grillo admitted committing the instant bank robbery and indicated that his accomplice was defendant Ferranto. He further related that they had robbed the Bankers Trust Company, on Horace Harding Expressway on October 19, 1971, of \$24,916, and also robbed the Reliance Federal Savings and Loan Association on Francis Lewis Boulevard on June 12, 1971 of \$29,719. Grillo stated that in each of the three bank robberies he stayed in the bank lobby with a sawed-off shotgun controlling the employees and customers while Ferranto vaulted into the teller's area in order to obtain the money. Grillo stated that Ferranto planned the robberies and received the larger share of the proceeds.

Based upon the information that Grillo supplied, agents proceeded to locate and arrest defendant Ferranto on November 5, 1971. When questioned, he offered no statements or cooperation. Agents described Ferranto as totally uncooperative and advised that none of the money from the three bank robberies was ever recovered. Although the defendant did not display a weapon during these robberies, agents nevertheless believe that there is a strong likelihood that he may have been armed. Authorities note that in view of Ferranto's plea of guilty to this offense, the other two pending cases in this District which charge him with robbing the Bankers Trust Company and the Reliance Federal Savings and Loan Association will be dismissed. According to agents, in these other bank robberies, the defendant and Grillo used the same "modus operandi", however in the commission of these offenses wore ski masks.

Defendant's Participation. This defendant played an active role in the October 6, 1971 robbery of the National Bank of North America at 192-02 Northern Boulevard, Queens, New York, in which \$11,863 was taken. While Grillo herded the employees into a rest room and held them at bay with a sawed-off shotgun, the defendant vaulted over the teller's counter, and placed the currency in a bag that he was carrying. After obtaining the money, they successfully made their escape without interference from authorities or bank personnel. Agents advise that when the defendant was arrested, he offered no statements or cooperation. They further note that he and Grillo also robbed the Bankers Trust Company and the Reliance Federal Savings & Loan Association. Authorities note that none of the monies from these bank robberies was recovered, and authorities have no knowledge as to what the defendant did with his share of the proceeds.

Defendant's Statement. In a rather cautious statement, the defendant admitted his guilt. He advised, that prior to his involvement in the instant offense, he was engaged in his own business which entailed the renovating of homes. According to the defendant, as a result of poor management, his business began to do poorly and as a result, he soon found himself in heavy debt. He stated that his financial problems became so severe that he was convinced to rob the National Bank of North America by his codefendant John Grillo who was an acquaintance aware of his financial predicament. The defendant contended that Grillo talked him into committing the offense and planned the robbery. The defendant stated that he shared in the proceeds and received approximately \$6,000, which money he used to pay his bills. The defendant denied participating in any other bank robberies and refused to discuss the other two cases that are currently

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pending against him in our Court. In essence, the defendant's statement impressed us as being unconvincing and there appears to be much more to the circumstances surrounding his involvement than he is willing to divulge.

2. PRIOR RECORD:

AS a youngster, the defendant had numerous run-ins with the law for escapades ranging from running away from home to stealing automobiles. As a result of his incorrigibility he was placed in Children's Village, by the Kings County Children's Court, in September, 1945. He remained in placement at this institution until January, 1947, when he was discharged to his family's custody.

4/23/50- Investigation - Alexandria, Va.- No disposition
(age 20) (Suspicion of Death) on record.

The defendant advises that in this instance he was arrested by the Alexandria Police following the sudden, accidental death of his step-son. He indicated that since the police were unable to prove that there was any wrongdoing he was released by authorities.

5/7/52 - Grand Larceny - Suffolk County - 1 year, Suffolk
(age 22) Court County Jail
ESS- Probation
Sp.Con. Restitution

2/22/54 Larceny of Bank - Alexandria, Va. - 2/24/54-
(age 23) 2- Disorderly Conduct 1-Dismissed
3- Assault & Battery 2-30 days
3-Dismissed

1/24/56- Grand Larceny - Arlington, Va. - 2/7/56-dismissed.
(age 25)

7/17/57 Armed Robbery - Arlington, Va. - 12/10/57- 12 year
(age 27) paroled 1/18/63
max. exp. of sent.
9/7/65

In this instance, the defendant robbed a shoe store and successfully made off with \$386 in currency. The defendant was however, arrested by police shortly after commission of the crime. Subsequently, while awaiting sentence, the defendant and two others escaped from the Alexandria City Jail and then broke into a gas station in order to steal an

1 UNITED STATES DISTRICT COURT
2 EASTERN DISTRICT OF NEW YORK

3 -----X
4 UNITED STATES OF AMERICA :

71 CR 1138

5 -against- :

6 JOHN CHARLES FERRANTO, :

7 Defendant. :
8 -----X

9 United States Courthouse
10 Brooklyn, New York
11 March 3, 1972
12 10 O'clock A.M.

13 B e f o r e :

14 HONORABLE JACOB MISHLER, CHIEF U.S.D.J.
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20 ILENE GINSBERG
21 ACTING OFFICIAL COURT REPORTER
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2 APPEARANCES:3 ROBERT A. MORSE, ESQ.,
4 United States Attorney for the
5 Eastern District of New York6 BY: GUY L. HEINEMANN, ESQ.,
7 Assistant United States Attorney.8 IRA LONDON, ESQ.,
9 Attorney for Defendant.10
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2 THE CLERK: Criminal cause for sentence, USA
3 v. John Charles Ferranto.

4 MR. LONDON: Good morning, your Honor.

5 THE COURT: Good morning.

6 John Charles Ferranto, do you have anything to
7 say --

8 MR. LONDON: Judge, may I have the opportunity
9 to go through the Probation Report very briefly?

10 THE COURT: Surelv.

11 Let the record show I have delivered the
12 complete Probation Report, aside from the face sheet,
13 to Mr. London.

14 (Recess taken).

15 THE COURT: All right.

16 Having read the Probation Report, Mr. John
17 Charles Ferranto, do you have anything to say before
18 sentence is imposed upon you?

19 MR. LONDON: There is really not much in the
20 Probation Report I would want to emphasize. Most of
21 it is negative. The defendant has very few things
22 to commend him to this Court.

23 THE COURT: I give this to you to make certain
24 that what is in the report reported accurately.

25 MR. LONDON: I would wish to bring to the

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2 Court's attention that his case was severed because
3 of lack of identification.

4 There were originally, at the Wade Hearing,
5 four witnesses who didn't know if he was the man or
6 they couldn't be sure, and the fifth witness was the
7 only witness to give evidence, and he said, after
8 viewing the defendant's rear of the head, he thought
9 it was the man.

10 The Judge stated, as to the identification
11 means used, that he thought it was outrageous.

12 We completed the Wade Hearing --

13 MR. HEINEMANN: This indictment is still
14 pending --

15 THE COURT: Let's not have cross examination
16 here. It is only an indictment. I am not charging
17 that against this defendant.

18 MR. LONDON: I mention it only because the
19 facts involved, I find to be rather inflammatory and
20 I wanted to bring it to the Court's attention as
21 far as mitigating circumstances. I mean, it is highly
22 questionable as to whether this defendant was in that
23 incident.

24 THE COURT: He was in a prior grand larceny,
25 a prior armed robbery --

MR. LONDON: He has a criminal background.

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2 However, he did plead guilty.

3 THE COURT: I never consciously give credit to
4 a defendant for pleading guilty. The only thing a
5 defendant gains is that all the gory details are not
6 brought out, so he may get the advantage only because
7 I don't know how it happened.

8 A number of times, I never know how bad the
9 defendant was until the trial, and then he reaps the
10 disadvantage of it. That's all.

11 MR. LONDON: That appears to be a controversy
12 running through the Court system today.

13 THE COURT: I don't think there is a Judge on
14 the bench, who will even admit to himself that he
15 gives someone, a defendant, the benefit of the plea.
16 We always invite the defendant to try his case. Some
17 defendants are hurt by it, and if the Government's
18 case is strong, there is no chance for an acquittal,
19 and in addition to that, so much of what was not said
20 in the indictment, comes out during the trial.

21 MR. LONDON: I think credit should be given to
22 a man who says "I'm guilty, and I want to admit my
23 guilt."

24 THE COURT: Yes, that is another plus. In
25 other words, it is some evidence of a step toward
rehabilitation, I agree.

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2 MR. LONDON: There are only two things I want
3 to mention in the way of a positive plus, to the Court:

4 He has four children, also supports his wife
5 and those children. He is devoted to them. He is
6 also a highly skilled person, he is an electrician.
7 I understand in West Street, he is assisting the
8 Chief Engineer.

9 I would ask you to consider the possibility of
10 a work-jail program, in view of his age, which is
11 forty one. If he receives any extensive sentence,
12 it would, in effect, be a life sentence.

13 If your Honor could see your way to giving him
14 a sentence, shorter than the maximum -- a work-jail
15 program -- there is hope he can be rehabilitated.
16 He knows he has reached the end of his string, insofar
17 as this particular way of life.

18 THE COURT: John Charles Ferranto, on your
19 plea of guilty to count one, indictment 71 CR 1138,
20 I sentence you to the custody of the Attorney General
21 for a term of fifteen years, pursuant to 18 USC 4208
22 (a) (2).

23 MR. HEINEMANN: The Government moves to dismiss
24 count two in indictment 71 CR 1138, and moves to
25 dismiss 71 CR 1137 and 71 CR 1139.

THE COURT: Motion granted.

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2 MR. HEINEMANN: The dismissal, of course, is
3 to only the defendant, Ferranto.

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